STATE OF MICHIGAN

MIKE COX, ATTORNEY GENERAL

LEGAL BIRTH DEFINITION ACT: Application of Legal Birth Definition Act to abortion procedures

STATUTES:

PHYSICIANS AND SURGEONS:

PROSECUTORS:

The Legal Birth Definition Act, MCL 333.1081 *et seq*, which defines when a person shall be considered born for all purposes under the law, has the effect of banning, with certain exceptions, those dilation and extraction (D & X) abortion procedures that require the killing of a "perinate" as defined in the act. The Legal Birth Definition Act does not have the effect of banning the dilation and evacuation (D & E) abortion procedure.

A physician or physician's agent is immune from criminal, civil, or administrative liability for performing a dilation and extraction (D & X) abortion procedure when, in the "physician's reasonable medical judgment and in compliance with the applicable standard of practice and care," it is necessary to protect the life or health of the mother as set forth in section 3(2) of the Legal Birth Definition Act, MCL 333.1083(2).

Prosecuting attorneys are directed to employ the interpretation of the Legal Birth Definition Act contained in this opinion.

Opinion No. 7174 April 4, 2005

Honorable Cameron Brown
State Senator
The Capitol
Lansing, MI 48909

On behalf of the Hillsdale County Prosecuting Attorney, you have asked two questions regarding the application of the Legal Birth Definition Act (LBDA), MCL 333.1081 *et seq*, to the performance of abortion procedures. You ask: (1) whether the LBDA bans partial-birth abortions and any other abortion procedures; and (2) whether

there are circumstances under which application of the LBDA will not result in criminal or other liability.

When interpreting the language of a statute, the primary goal is to give effect to the Legislature's intent. *Wayne County v Hathcock*, 471 Mich 445, 456; 684 NW2d 765 (2004). "[I]t is a well-established rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation." *Pulver v Dundee*, 445 Mich 68, 75; 515 NW2d 728 (1994). See also *Attorney General v Detroit United Railway*, 210 Mich 227, 256; 177 NW2d 726 (1920) ("We must presume that in framing legislation the legislature acts with a just appreciation and at least with a cursory knowledge of the constitutional limitations within which it may function"). A statute is "presumed to be constitutional unless its unconstitutionality is *clearly* apparent." *McDougal v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999) (emphasis added), citing *People v Bricker*, 389 Mich 524, 528; 208 NW2d 172 (1973).

With respect to statutes that regulate and prohibit abortion procedures, the Michigan Supreme Court has expressly required that such laws be read in a manner that preserves their constitutionality. *Bricker*, 389 Mich at 528-529. See also *People v Higuera*, 244 Mich App 429, 434; 625 NW2d 444 (2001). In *Bricker*, the Michigan Supreme Court had its first occasion to examine Michigan's criminal abortion statute,

MCL 750.14[1], after the United States Supreme Court's decisions in *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), and *Doe v Bolton*, 410 US 179; 93 S Ct 739; 35 L Ed 2d 201 (1973). The *Bricker* Court held that under the *Roe* decision, Michigan's criminal abortion statute "cannot stand as relating to abortions in the first trimester of a pregnancy as authorized by the woman's attending physician in the exercise of his medical judgment." *Bricker,* 389 Mich at 527. In evaluating whether Michigan's abortion statute could nevertheless be applied to non-physicians, the Court explained that its role is to preserve the Michigan abortion law to the extent possible:

> *We are duty bound under the Michigan Constitution to preserve the laws of this state and to that end to construe them if we can so that they conform to Federal and state constitutional requirements*. The United States Supreme Court would be the first to acknowledge that our construction of our statutes in a manner which does not offend the Federal constitutional right recognized in *Roe* and *Doe* is determinative until changed by the Michigan Legislature or the initiative of the people of this state. [*Bricker,* 389 Mich at 528; emphasis added.]

The Court reiterated the principle that Michigan law requires a constitutional construction of a statute, even if its reach might otherwise extend to unconstitutional applications, as long as it may be validly applied without defeating the statute's general purpose:

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[1] MCL 750.14 states:

> Administering drugs, etc., with intent to procure miscarriage–
> Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.
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> In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

> "A legislative act may be entirely valid as to some classes of cases, and clearly void as to others.
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> * * *
>
> In any such case the unconstitutional law must operate as far as it can . . . . If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others." [*Bricker,* 389 Mich at 530, quoting Cooley, Constitutional Limitations (5th ed), pp 215-216.]

Employing this principle, the Court affirmed the conviction of a non-physician who performed an abortion, construing MCL 750.14 to "mean that the prohibition of this section shall not apply to 'miscarriages' authorized by a pregnant woman's attending physician in the exercise of his medical judgment; the effectuation of the decision to abort is also left to the physician's judgment; however, a physician may not cause a miscarriage after viability except where necessary, in his medical judgment, to preserve the life or health of the mother." *Id.,* at 529-530.

More recently, in *Higuera,* the Court of Appeals employed this same approach in sustaining the constitutionality of MCL 750.14 as applied where there were allegations that a doctor performed an abortion on a 28-week-old fetus without a medical reason for doing so. *Higuera,* 244 Mich App at 433. The Court explained that, for legislation enacted after *Roe* and *Doe,* Michigan courts examine such statutes with the understanding that the Legislature seeks to prohibit only those abortions that are not constitutionally protected:

> After *Bricker* was decided in 1973, the Legislature enacted various statutes regulating the performance of abortions . . . but did not revise MCL 750.14 . . . .
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> * * *
>
> We think it clear that in enacting those statutes after *Bricker, the Legislature intended to regulate those abortions permitted by Roe and Doe, and Bricker, and did not intend to repeal the general prohibition of abortions to the extent permitted by the federal constitution*, as construed by the United States Supreme Court. [*Higuera*, 244 Mich App at 436-437; emphasis added.]

In short, the courts give effect to the Legislature's intent in abortion cases but in a manner that strives to conform abortion statutes to constitutional requirements.

Applying these principles, the LBDA[2] defines when a person shall be considered "legally born" for the purposes of Michigan law. MCL 333.1083 and MCL 333.1085. The term "perinate" is defined in section 5(d):

> "Perinate" means a live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus[3] until the point of complete expulsion or extraction from the mother's body. [MCL 333.1085(d).]

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[2] The language at issue here was originally passed by the Legislature as Enrolled Senate Bill 395 but was vetoed by the Governor on October 10, 2003. Following the veto, the legislation was proposed by initiative petition pursuant to Const 1963, art 2, § 9 and subsequently approved by a majority vote of both the Michigan House of Representatives and Senate on June 9, 2004, and became 2004 PA 135. The new act was to take effect on March 30, 2005, the 91st day after the *sine die* adjournment of the 2004 session of the Legislature. Const 1963, art 4, § 27. Its enforcement has been stayed until June 15, 2005, in the pending case of *Northland Family Planning Clinic, Inc v Attorney General*, US District Court (ED Mich) Docket No. 05CV70779.

[3] "Introitus" is defined in Stedman's on-line medical dictionary as "[t]he entrance into a canal or hollow organ, as the vagina." http://216.251.232.159/semdweb/internetsomd/ASP/1529851.asp.

Under the LBDA, when any "anatomical part"[4] of a "live"[5] human being is known to have passed the "plane of the vaginal introitus," the human being, or "perinate," gains the protection of the law as "a legally born person for all purposes under the law." MCL 333.1083(1). While the statute does not by its own terms ban any type of abortion procedure, the practical effect of the LBDA on abortion procedures is that any physician who performs an abortion that results in the injury or death of a "perinate" would be subject to criminal prosecution. The LBDA makes a specific exception for "performing any procedure that results in injury or death of a perinate while completing the delivery" that in the "physician's reasonable medical judgment and in compliance with the applicable standard of practice and care" is necessary to "save the life of the mother" or to "avert an imminent threat to the physical health of the mother." MCL 333.1083(2)(b)(i) and (ii).

Before analyzing the statutory language, it is necessary to look at the applicable constitutional law because the Legislature is presumed to enact legislation consistent with such principles. *Pulver, supra; Detroit United Railway, supra; Bricker, supra; Higuera, supra.* Recently, the United States Supreme Court ruled that a Nebraska statute that prohibited certain abortion procedures placed an undue burden on a woman's federal

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[4] The statute defines an "[a]natomical part" as any "portion of the anatomy of a human being that has not been severed from the body, but not including the umbilical cord or placenta." MCL 333.1085(a).

[5] The statute defines "[l]ive" as when the perinate demonstrates 1 or more of the following biological functions:

> (i) A detectable heartbeat.
>
> (ii) Evidence of breathing.
>
> (iii) Evidence of spontaneous movement.
>
> (iv) Umbilical cord pulsation. [MCL 333.1085(c).]

abortion rights by limiting the "dilation and evacuation" form of abortion, known as the D & E abortion procedure. The Court concluded that the D & E procedure was a constitutionally protected practice. *Stenberg v Carhart*, 530 US 914, 938-939; 120 S Ct 2597; 147 L Ed 2d 743 (2000).

Applying *Carhart*, the United States Court of Appeals for the Sixth Circuit upheld an Ohio statute that prohibited only the "dilation and extraction" abortion procedure**,** known as the D & X abortion procedure, and not the D & E procedure. See *Women's Medical Professional Corp v Taft*, 353 F3d 436 (CA 6, 2003). See also *Carhart*, 530 US at 951 (O'Connor, J., concurring, stated that "a ban on partial-birth abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view"). In examining the Ohio statute in light of *Carhart*, the Sixth Circuit provided definitions of both the D & E procedure and the D & X procedure:

> **Dilation and Evacuation (D & E) procedure:**
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> As performed late in the second trimester, the abortion procedure commonly referred to as dilation and evacuation, or "D & E," begins with dilation of a woman's cervix. Once sufficient dilation is achieved, the physician reaches into the woman's uterus with an instrument, grasps an extremity of the fetus, and pulls. When the fetus lodges in the cervix, the traction between the grasping instrument and the cervix causes dismemberment and eventual death, although death may occur prior to dismemberment. The process continues until the entire dead fetus has been removed, piece-by-piece, from the woman's uterus. [*Taft*, 353 F3d at 439; citations omitted.]
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> **Dilation and Extraction (D & X) procedure:**
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> The physician initiates the D & X or partial birth abortion procedure by dilating a woman's cervix, but to a greater degree than in the traditional D & E procedure. Once the physician achieves sufficient

> dilation, the manner in which the abortion proceeds depends upon the presentation of the fetus. . . . In a breech extraction [where the fetus presents in a feet first position], the physician partially delivers the fetus through the mother's cervix up to a point that allows the physician to access the fetus's head, which is inside the mother, while stabilizing the fetus's body, which is outside the mother. Then, in order to collapse the fetus's skull (so that it will pass easily through the cervix), the physician forces a pair of scissors into the base of the skull, enlarges the opening and evacuates the contents with a suction catheter. The abortion concludes with the removal, in a single pass, of the fetus's intact, dead body. If the fetus presents head first (a cephalic presentation), the doctor first collapses the fetus's exposed skull by breaching and compressing the [head] with the forceps' jaws, inserting a finger . . . , or piercing the [head] with a sharp instrument, such as a tenaculum or a large-bore needle. The doctor then suctions out the fetus's skull contents, if necessary, and completes the delivery of the fetus from the mother's body, whole and intact, in a single pass. [*Taft*, 353 F3d at 439-440; citations and quotation marks omitted.]

As the Sixth Circuit noted, these terms "have a generally understood meaning, regularly relied upon by courts, litigants, medical experts, and legislatures operating in this field of law." *Taft*, 353 F3d at 439. In upholding the constitutionality of the Ohio statute, the Sixth Circuit was also clear that, under *Carhart*, the D & E procedure is protected by the federal constitution.

Significantly, the Sixth Circuit emphasized that "courts have explained repeatedly that the principal distinction between D & X and D & E is *intactness*: D & X maximizes intactness and D & E requires dismemberment prior to removal of the fetus." *Taft*, 353 F3d at 452 (emphasis in original), citing *Carhart*, 530 US at 927, 939 and *Women's Medical Professional Corp v Voinovich*, 130 F3d 187, 199 (CA 6, 1997).

With this understanding of the federal constitutional rules, the Michigan Legislature enacted the LBDA in 2004. In order to determine which abortion procedures

are subject to criminal prosecution as a result of passage of the LBDA, the question then is which abortion procedure requires the injury or death of a perinate. Therefore, the crucial statutory language is found in the provision defining the term "perinate" and related terms.

Given the established definitions of the D & X and D & E procedures described in *Taft* and *Carhart* and the prevailing constitutional principles, Michigan's LBDA prohibits the D & X procedure only. The definition of "perinate" spans the period from the time an "anatomical part" of a live and intact fetus passes beyond the plane of the vaginal introitus to the time the perinate is completely expelled or extracted from the mother's body. MCL 333.1083(2).

As explained in *Carhart* and *Taft,* the D & E procedure requires dismemberment or disarticulation of the fetus and removal of the dead fetus "piece-by-piece" from the woman's uterus – there is no intact extraction of the fetus. Consequently, in a D & E procedure as described by *Taft* and *Carhart*, the fetus would never achieve the status of a perinate under the statute. The statute specifically excludes from its definition of "anatomical part" a part of the fetus that has been "severed from the [fetus's] body." MCL 333.1085(a). In contrast, the D & X procedure, as previously defined, involves the partial extraction of a live and intact fetus for the sole purpose of intentionally killing it, which under the LBDA would be the killing of a "perinate." The LBDA cannot be read, however, to place any restrictions on actions taken before an anatomical part of an intact, live fetus passes beyond the plane of the vaginal introitus of the mother's body.

This reading of the LBDA is consistent with the legislative history of the statute. The statute was known as an effort to ban "partial-birth abortions," which is the common term used for the D & X procedure. See Senate Fiscal Agency Analysis, SB 395, October 10, 2003, pp 2-5, 6. See also *Carhart,* 530 US at 942 ("'partial birth abortion,' [is] a term ordinarily associated with the D & X procedure"). The arguments advanced in support of the statute were unambiguous in targeting the D & X procedure:

> [T]he bill [SB 395] effectively would prohibit the practice of partial-birth abortion. . . . *Partial-birth abortion is a gruesome procedure whereby a nearly full-term fetus is partially delivered and then killed by means of having its skull crushed or incised before the delivery is completed. . . .* This extreme practice should not be tolerated in a civilized society and violators should be punished appropriately. While the bill does not refer to partial-birth abortion by name, it specifies that a perinate would be considered a legally born person for all purposes under the law. [Senate Fiscal Agency Analysis, SB 395, October 10, 2003, p 6; emphasis added.]

This description corresponds to the definition of the D & X procedure in *Taft,* 353 F3d at 439-440, and *Carhart,* 530 US at 927-928.

Moreover, interpreting the LBDA as prohibiting D & X procedures that require the killing of a perinate, and not the D & E procedure, is consistent with the rule requiring that statutes be accorded the presumption of constitutionality. See *McDougal,* 461 Mich at 24 (a statute is "presumed to be constitutional unless its unconstitutionality is clearly apparent"). In fact, given the Michigan Supreme Court's decision in *Bricker,* this interpretation of the statute is compelled. See *Bricker,* 389 Mich at 528-530. In the context of the LBDA, current federal case law is clear that the only abortion procedure that Michigan may prohibit is the D & X procedure that requires the killing of a perinate. See *Carhart, supra; Taft, supra.*

Any application of the statute to constitutionally protected methods of abortion, such as the D & E procedure, is void under *Bricker*. Michigan law cannot constitutionally limit the D & E abortion procedure. *Carhart, supra*; *Taft, supra*. See also *Bricker*, 389 Mich at 528-530. Therefore, the LBDA can have no application where an "anatomical part" of a live and intact fetus passes beyond the plane of the vaginal introitus during a constitutionally protected method of abortion such as the D & E abortion procedure.[6]

It is my opinion, therefore, in answer to your first question, that the Legal Birth Definition Act, MCL 333.1081 *et seq*, which defines when a person shall be considered born for all purposes under the law, has the effect of banning, with certain exceptions, those dilation and extraction (D & X) abortion procedures that require the killing of a "perinate" as defined in the act. The Legal Birth Definition Act does not have the effect of banning the dilation and evacuation (D & E) abortion procedure.

Your second question asks whether there are circumstances under which application of the LBDA will not result in criminal or other liability. Section 3 of the statute provides that a physician or agent of a physician[7] is immune from "criminal, civil, or administrative liability for performing any procedure that results in injury or death of a

[6] In all other cases, whether abortion-related or not, the LBDA would only apply to actions taken after a fetus has achieved the status of a "perinate" as defined by the statute. For example, the LBDA would not apply to the killing of a fetus where the fetus presents head first and no "anatomical part" of the intact, live fetus has passed beyond the plane of the vaginal introitus.

[7] As used in this opinion, "agent" means "an individual performing an act, task, or function under the delegatory authority of a physician." MCL 333.1083(2).

perinate while completing the delivery of the perinate" under any of the following circumstances:

> (a) If the perinate is being expelled from the mother's body as a result of a spontaneous abortion.
>
> (b) If in that physician's reasonable medical judgment and in compliance with the applicable standard of practice and care, the procedure was necessary in either of the following circumstances:
>
> > (i) To save the life of the mother and every reasonable effort was made to preserve the life of both the mother and the perinate.
> >
> > (ii) To avert an imminent threat to the physical health of the mother, and any harm to the perinate was incidental to treating the mother and not a known or intended result of the procedure performed. [MCL 333.1083(2)(a) and (b).]

The phrase "imminent threat to the physical health" is defined to mean "a physical condition that if left untreated would result in substantial and irreversible impairment of a major bodily function." MCL 333.1085(b).

The Sixth Circuit in the *Taft* case upheld the constitutionality of the Ohio statute, which contained an exception based on "reasonable medical judgment." *Taft*, 353 F3d at 445. The provisions of the Ohio criminal code at issue in *Taft* stated:

> [N]o person shall knowingly perform a partial birth procedure on a pregnant woman when the procedure is not necessary, in reasonable medical judgment, to preserve the life or health of the mother as a result of the mother's life or health being endangered by a serious risk of the *substantial and irreversible impairment of a major bodily function*. [*Taft*, 353 F3d at 440, citing Ohio Rev. Code Ann. § 2919.15.1(B), (C); emphasis added.]

The Sixth Circuit concluded that "Ohio's maternal health exception is valid because it

permits the partial birth procedure when necessary to prevent significant health risks. The Fourteenth Amendment, as applied in [*Planned Parenthood v Casey*, 505 US 833; 112 S Ct 2791; 120 L Ed 2d 674 (1992)] and *Carhart*, requires nothing more." *Taft*, 353 F3d at 445.

The immunity provisions contained in the LBDA are like the Ohio statute in many significant respects. Under the LBDA, the decision determining whether the procedure is necessary is based on the "reasonable medical judgment" of the physician performing the procedure. MCL 333.1083(b). The physician's decision must also be "in compliance with the applicable standard of practice and care." MCL 333.1083(b). In the words of the Supreme Court in *Carhart*, a physician under the LBDA does not have "unfettered discretion" in the selection of abortion methods; rather there is a health exception where "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Carhart, supra*, 530 US at 938. The LBDA also defines "[i]mminent threat to the physical health" of the mother as a physical condition that if left untreated would result in "substantial and irreversible impairment of a major bodily function." MCL 333.1085(b). This is almost identical to the language upheld as constitutional in the Ohio statute. See *Taft, supra.*

The primary difference between the Michigan and Ohio statutes arises from the physician's obligation in Michigan to preserve the life of the perinate and to avoid intentionally harming the perinate when attempting to preserve the life or health of the mother. The LBDA immunizes a physician from criminal, civil, or administrative

liability for performing a procedure that results in injury or death to a perinate while completing the delivery of the perinate to save the life of the mother or to avert an imminent threat to the mother. MCL 333.1083(2). The LBDA provides immunity in the following two circumstances: (1) in attempting to save the life of the mother, the physician must make "every reasonable effort . . . to preserve the life of both the mother and the perinate;" or (2) in attempting to avert an imminent threat to the mother's health, any harm to the perinate must be "incidental to treating the mother and not a known or intended result of the procedure performed." MCL 333.1083(2)(b).

Where the physician concludes that the mother's life or health makes it medically necessary to perform an act that will injure or kill the perinate, the physician must first consider other reasonably safe alternatives, if any, before doing so. MCL 333.1083(2)(b)(i) and (ii). In other words, the physician must look to ensure the life or physical health of the mother without harming the perinate where medically possible. These considerations do not, however, prevent a physician from performing a procedure that may directly harm or kill the perinate where in the reasonable medical judgment of the physician it is necessary to safeguard the mother's life or health. See *Carhart, supra; Taft, supra.*

It is my opinion, therefore, in answer to your second question, that a physician or physician's agent is immune from criminal, civil, or administrative liability for performing a dilation and extraction (D & X) abortion procedure when in the "physician's reasonable medical judgment and in compliance with the applicable standard of practice

and care," it is necessary to protect the life or health of the mother as set forth in section 3(2) of the Legal Birth Definition Act, MCL 333.1083(2).

As Michigan's Attorney General, it is my duty to supervise and advise all prosecuting attorneys and to take the necessary actions to protect the interests of the people of the State. MCL 14.30. See also MCL 14.28.[8] The questions presented in your letter on behalf of the Hillsdale County Prosecuting Attorney involve matters of great importance that affect the interests of the people of the State of Michigan. As proclaimed by the people who proposed this act by initiative petition and by the Legislature, the State "has a compelling interest in protecting the life of a born person." MCL 333.1082(d). There is currently pending before the federal courts a case challenging the constitutionality of the Legal Birth Definition Act. Further, the people of the State have an interest in assuring that there will be a uniform and fair application of this act throughout the State of Michigan. Persons may reasonably and in good faith rely on the advice contained in this opinion; pursuant to fundamental rules of due process, they are protected from prosecution. See *People v Woods*, 241 Mich App 545, 557; 616 NW2d 211 (2000).[9] Therefore, in order to protect the interests of the people, consistent with my

[8] See Letter Opinion of the Attorney General to Representative D. J. Jacobetti, dated May 1, 1979, p 2. In his letter, former Attorney General Frank Kelley explained that "[w]hen advising State agencies and prosecutors, I consider such advice as binding whether in letter form or in the form of an opinion to be published." See also *Traverse City School Dist v Attorney General*, 384 Mich 390, 410, n 2; 185 NW2d 9 (1971).

[9] This bar to prosecution is based on the criminal doctrine of entrapment by estoppel. "To determine the availability of the defense, the court must conclude that (1) a government must have announced that the charged criminal act was legal; (2) the defendant relied on the government announcement; (3) the defendant's reliance was reasonable; and (4) given the defendant's reliance, the prosecution would be unfair." *United States v Levin*, 973 F2d 463, 468 (CA 6, 1992).

authority under MCL 14.30, I direct all prosecuting attorneys to employ the interpretation of the Legal Birth Definition Act contained in this opinion.

MIKE COX
Attorney General